

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

RANDALL D. WATKINS

Claimant

VS.

EXCEL CORPORATION

Respondent,
Self-Insured

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Docket No. 1,000,480

ORDER

Both claimant and respondent appealed the February 15, 2002 preliminary hearing Order entered by Administrative Law Judge Nelsonna Potts Barnes.

ISSUES

This is a claim for an October 2, 2001 accident and alleged injuries to the low back. In the February 15, 2002 preliminary hearing Order, Judge Barnes determined that claimant had injured his back at work, but denied claimant's request for benefits because he had failed to provide respondent with timely notice of the accidental injury.

Claimant contends the Judge erred by finding that claimant did not provide respondent with timely notice of the accident. Claimant argues that he notified his supervisor of the injury on October 5, 2001. In the alternative, claimant argues there was just cause to extend the notice period to 75 days following the accident as he was on probation and fearful of losing his job. Accordingly, claimant requests the Board to reverse the Judge's finding that claimant failed to provide respondent with timely notice.

Conversely, respondent contends the Judge erred by finding that claimant's low back injury arose out of and in the course of employment. Respondent argues claimant injured his back at home while painting. In the alternative, respondent argues that claimant injured his back at work while stretching, which would be a personal risk not related to the employment. In either event, respondent requests the Board to reverse the Judge's finding that claimant sustained personal injury by accident arising out of and in the course of employment.

The only issues before the Board on this appeal are:

1. Did claimant sustain personal injury by accident arising out of and in the course of employment with respondent?
2. If so, did claimant provide respondent with timely notice of the accident or injury?

FINDINGS OF FACT

After reviewing the record compiled to date, the Board finds:

1. Claimant worked for respondent from November 1997 through November 20, 2001, when he was terminated.
2. While at work on October 2, 2001, claimant turned in his chair to stretch and heard a pop in his back. Immediately before that incident, claimant's arms, legs and back were sore as the weekend before he had been painting his house.
3. After the alleged twisting incident, claimant did not notice back symptoms until later that evening. When claimant awoke the next morning, he could hardly move. Consequently, claimant telephoned a chiropractor for an appointment. Claimant sought chiropractic treatment as he had seen a chiropractor in the past for back problems and had received good results. In all, claimant received chiropractic treatment from October 3 through November 9, 2001. The chiropractic records do not disclose a history of injury.
4. On approximately October 5, 2001, claimant's supervisor, Robert Alexander, saw claimant walking with a limp. Mr. Alexander asked claimant what had happened and claimant responded by stating that he had been painting his house and his back was tired and he had twisted it in his chair. Claimant testified, in part:

Well, it was a hallway conversation, he was going to a meeting, I was going to my desk. And I was limping at that time. It was obvious that my back was giving me -- was hurting, and I was limping and tending to have pain. And when he saw me he said, what happened to you? And at that point in time I said, well, I was painting my house and my back was tired and I twisted it in my chair. And -- okay. This was in a hallway conversation, just in passing.¹

Mr. Alexander agrees with claimant's description of that conversation and remembers claimant mentioning something about turning and twisting in a chair. But Mr.

¹ February 14, 2002 preliminary hearing transcript, at pages 15 and 16.

Alexander thought the chair incident was somehow related to painting. As far as Mr. Alexander knows, a November 21, 2001 letter from claimant's attorney was the first instance that respondent knew claimant was alleging a work-related injury.

5. After several chiropractic treatments, claimant's symptoms did not improve and he then sought treatment from his personal physician, Dr. C. Mitchell, and her associate, Dr. Roger Thomas. On October 11, 2001, claimant saw Dr. Mitchell. After undergoing an MRI on November 8, 2001, claimant was referred to Dr. Eustaquio O. Abay, II, a neurosurgeon, for treatment. The medical records from claimant's initial visit with Dr. Mitchell on October 11, 2001, do not disclose the alleged twisting incident but they do indicate that claimant hurt his back while painting at home.

6. Several months before the alleged twisting incident, respondent had placed claimant on probation. On November 15, 2001, claimant was told that he was being terminated. That was claimant's actual last day working for respondent, although the official termination was effective November 20, 2001. Also on November 20, 2001, claimant saw Dr. Abay for the first time. Less than one week later, on November 26, 2001, Dr. Abay operated on claimant's low back for a herniated disk. Claimant advised the doctor that he had turned and injured his back while at work.

CONCLUSIONS OF LAW

1. The Board concludes the preliminary hearing Order should be affirmed.
2. The Board affirms the Judge's finding that claimant failed to provide respondent with timely notice of the accidental injury. According to claimant, he did not want to advise respondent that he had injured his back at work because he was on probation. The Board concludes that the conversation claimant had with his supervisor on approximately October 5, 2001, did not sufficiently inform respondent of a work-related accident or injury as to satisfy the requirements of K.S.A. 44-520, which provides:

Except as otherwise provided in this section, proceedings for compensation under the workers compensation act shall not be maintainable unless notice of the accident, stating the time and place and particulars thereof, and the name and address of the person injured, is given to the employer within 10 days after the date of the accident, except that actual knowledge of the accident by the employer or the employer's duly authorized agent shall render the giving of such notice unnecessary. The ten-day notice provided in this section shall not bar any proceeding for compensation under the workers compensation act if the claimant shows that a failure to notify under this section was due to just cause, except that in no event shall such a proceeding for compensation be maintained unless the notice required by this section is given to the employer within 75 days after the date of the accident unless (a) actual knowledge of the accident by the employer or the

employer's duly authorized agent renders the giving of such notice unnecessary as provided in this section, (b) the employer was unavailable to receive such notice as provided in this section, or (c) the employee was physically unable to give such notice.

The Board also concludes that claimant's alleged reason for failing to advise respondent that he had injured his back at work within the initial 10 days following the October 2, 2001 accident does not establish just cause for extending the notice period to 75 days.

3. The conclusion that claimant failed to provide respondent with timely notice of the accident or injury renders moot the issue whether claimant's accidental injury arose out of his employment.

WHEREFORE, the Board affirms the February 15, 2002 Order entered by Judge Barnes.

IT IS SO ORDERED.

Dated this ____ day of May 2002.

BOARD MEMBER

c: E. L. Lee Kinch, Attorney for Claimant
Eric K. Kuhn, Attorney for Respondent
Nelsonna Potts Barnes, Administrative Law Judge
Philip S. Harness, Workers Compensation Director